1997

State of Utah v. Vassilios Chalkidis : Brief of Appellee

Utah Court of Appeals

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[redacted]E UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 970100-CA
VASSILIOS CHALKIDIS,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR DISTRIBUTION OF A CONTROLLED SUBSTANCE (COCAINE) WITHIN 1000 FEET OF A PUBLIC PARK, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(a)(ii) (1996), IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, THE HONORABLE STANTON M. TAYLOR, PRESIDING

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for distribution of a controlled substance (cocaine) within 1000 feet of a public park, a first degree felony. This Court has jurisdiction over the appeal pursuant to the pourover provision of Utah Code Ann. § 78-2a-3(2)(j)(1996).

STATEMENT OF THE ISSUES ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Has defendant preserved his claim that the trial court's jury instruction defining "public place" should have conformed to the definition of that term as articulated in a civil case construing the Landowner Liability Act?

"With limited exceptions, the practice of this court has been to decline consideration of issues raised for the first time

on appeal." Espinal v. Salt Lake City Bd. of Educ., 797 P.2d 412, 413 (Utah 1990). Moreover, if a party leads the trial court into committing an error, that party cannot take advantage of the error on appeal. State v. Dunn, 850 P.2d 1201, 1220 (Utah 1993).

2. Does the term "public park" as used in the penalty enhancement provision of Utah Code Ann. § 58-37-8(5)(a)(v) include a neighborhood park located within a subdivision of 366 homes?

The proper interpretation of "public park" as used in a particular statute presents a question of law, reviewed on appeal for correctness. See, e.g., State v. Larsen, 865 P.2d 1355, 1357 (Utah 1993); State v. Shipler, 869 P.2d 968, 969 (Utah App. 1994).

3. Was the evidence that Gazebo Park was a public park for purposes of the enhancement provision of Utah Code Ann. § 58-37-8(5)(v) sufficient to support the jury's verdict?

A criminal conviction will be reversed for insufficient evidence only when the evidence is "so inconclusive or so inherently improbable that 'reasonable minds must have entertained a reasonable doubt' that the defendant committed the crime." State v. Goddard, 871 P.2d 540, 543 (Utah 1994)(quoting State v. Petree, 659 P.2d 443, 444 (Utah 1983), superseded on

other grounds, State v. Walker, 743 P.2d 191 (Utah 1987)).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The enhancement provision of Utah Code Ann. § 58-37-8(5) increases the penalty by one degree for a felony that would otherwise have been less than a first degree felony if the criminal act is committed:

> (i) in a public or private elementary or secondary school or on the grounds of any of those schools;
> (ii) in a public or private vocational school or post-secondary institution or on the grounds of any of those schools or institutions;
> (iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (5)(a)(i) and (ii);
> (iv) in or on the grounds of a pre-school or child-care facility;
> (v) in a public park, amusement park, arcade, or recreation center;
> (vi) in a church or synagogue;
> (vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;
> (vii) in a public parking lot or structure;
> (ix) within 1,000 feet of any structure, facility, or grounds included in Subsections (5)(a)(i) through (viii); or
> (x) with a person younger than 18 years of age, regardless of where the act occurs.

STATEMENT OF THE CASE

Defendant was charged with one count of distribution of a controlled substance within 1000 feet of a public park, a first degree felony (R. 2-3). He was tried before a jury and convicted as charged (R. 164-66). The trial court sentenced him to five years to life in the Utah State Prison, to run concurrently with two other prison sentences; recommended credit for time served; and ordered that he could be released to the Immigration and Naturalization Service for deportation proceedings (R. 253). This timely appeal followed (R. 254).

STATEMENT OF THE FACTS

Defendant was arrested after he sold cocaine to a confidential informant at his home in Lake View Heights, a North Ogden subdivision of 366 homes (R. 4, 274, 283). Defendant's home was located just across the street from Gazebo Park, the largest of three neighborhood recreation areas within the housing development (R. 275, 287, 296). The Lake View Heights Homeowners' Association, in which membership was mandatory for all homeowners, owned Gazebo Park, which contained playground equipment, tennis courts, and picnic facilities (R. 287, 295, 297). The park was freely accessed by the more than 1000 members of the public who lived in Lake View Heights (R. 284). The

subdivision was policed by the North Ogden city police department (R. 280).

These are the only facts relevant to defendant's appeal, which focuses on whether Gazebo Park was a "public park" for purposes of statutorily enhancing the penalty for distribution of a controlled substance from a second degree felony to a first degree felony.

SUMMARY OF ARGUMENT

Defendant argues that the trial court incorrectly instructed the jury on the meaning of "public" as that term is used in the phrase "public park" in the drug enhancement statute. He believes that the trial court should have used the definition articulated in Perrine v. Kennecott Mining Corp., 911 P.2d 1290 (Utah 1996), a civil case construing the Landowner Liability Act. Because defendant asserted a different position in the trial court -- that the jury ought not be given any instruction at all because the term was so commonly understood -- the argument he now asserts on appeal "smacks of invited error," and should not be considered. Parsons v. Barnes, 871 P.2d 516, 520 (Utah), cert. denied, 513 U.S. 966 (1994).

Second, in any event, the definition of "public place" articulated in jury instruction #28 correctly states the law. It

does not run afoul of the plain language of the statute and is strongly supported by both underlying legislative intent and public policy. Clearly, the law was intended to protect children from the influences and obvious dangers posed by persons who deal drugs in locations likely to be frequented by children. To insulate criminals who deal drugs in parks that belong to homeowners' associations but are nonetheless intended for use by neighboring children would contravene the fundamental purpose of the statute.

Finally, the evidence was sufficient to support the verdict. For a jury to construe Gazebo Park as a public park was not inherently improbable. All the jury had to do was look at how the park actually functioned. Substantial numbers of people, all members of the public, frequented the park; children were attracted by the playground equipment to play there; no locked gates or fences kept people out; and the city police patrolled the park.

For all of these reasons, defendant's conviction for distribution of a controlled substance within 1000 feet of a public park should be affirmed.

ARGUMENT

POINT ONE

DEFENDANT HAS WAIVED THE CLAIM THAT THE COURT'S INSTRUCTION ON THE MEANING OF "PUBLIC PLACE" SHOULD HAVE CONFORMED TO THE PERRINE DEFINITION OF THAT TERM

Defendant asserts on appeal that the trial court incorrectly instructed the jury on the meaning of "public," as that term is used in the phrase "public park" in the drug enhancement statute. See Utah Code Ann. § 58-37-8(5)(v). Because the court did not instruct the jury in conformity with the definition adopted in Perrine v. Kennecott Mining Corp., 911 P.2d 1290 (Utah 1996), defendant believes he was prejudiced and that this Court should vacate the enhancement and reduce his conviction to a second degree felony (Br. of App. at 18-20).

The law is well settled that a defendant must specifically state to the trial court the same grounds for objection to evidence that he presents on appeal. See, e.g., State v. Davis, 689 P.2d 5, 14 (Utah 1984). In the context of jury instructions, the general rule is that "[n]o party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the

matter to which he objects and the ground of his objection."[1] Utah R. Crim. P. 19(c).

In this instance, defendant made a clear and specific objection in the trial court to jury instruction #28, which defined "public place." He stated:

> Your Honor, at this time I would object to the inclusion of the definitions of "public" in the jury instructions based on the fact that the statute itself, which includes the Controlled Substance Act, does not itself have a definition of public. And that, basically, in the instructions -- they were added to the jury instructions. Those definitions of public came from other statutes, which it would appear from the language of those statutes that those definitions were only for that statute itself, or that portion of the statute -- for instance, the disorderly conduct statute, the pornography statute.
>
> I'd argue that the jury, itself, could have easily made a decision of simply what public means just because it's a very common term and didn't need any statutory instruction on that. And that's the basis of my objection, Your Honor.

(R. 262 or addendum A).

Defendant, then, wanted no instruction at all on the definition of "public place." He articulated the strategy

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[1] The rule makes an exception for cases involving "manifest injustice," which defendant has not asserted here. Utah R. Crim. P. 19(c).

underlying this position when he next objected to the lesser-included-offense instruction:

> I object at this time to the inclusion of the lesser included offense. The State has filed an Information in this case and did not file it in the alternative, and the addition of the lesser included offense substantially prejudiced the defendant's case by the fact that *we were looking forward to the -- going to the jury just on the first degree felony issue, with the inclusion of the enhancement,* because of the fact that I do think that we have a very good issue with regards to whether or not that is a public park. Obviously, if the jury doesn't find it to be a public park, they could not find a first degree felony and the defendant would have been acquitted in that instance. And that's why we're objecting at this time.

(R. 262-63)(emphasis added). Thus, defendant's two specific objections to the jury instructions were rooted in a single, clear strategy. He believed that if the jury had only the enhanced first degree felony to consider and could interpret "public park" in any way it chose, it would determine that Gazebo Park was not "public" and so acquit defendant.

Defendant's strategy is further highlighted by his subsequent silence when the trial court, after explaining its rationale for giving jury instruction #28, raised the Perrine case sua sponte and mused over its definition of "public" within

a civil context (R. 266-67).[2] The state then mentioned that the issue had been briefed at the preliminary hearing. In response, although defendant acknowledged that the state had done an "exhaustive search" of the law, he did not indicate even the slightest interest in a jury instruction based on Perrine's definition of "public" (R. 268).[3] Defendant's last opportunity to raise the matter came at the end of the hearing when the court asked defendant if there was "any further matter of business" (R. 269). Defendant replied that there was not. Throughout the hearing on objections to jury instructions, then, defendant remained consistent in his strategy that a jury instruction on the meaning of "public" should not be given.

Given these undisputed facts, defendant's argument on appeal that the trial court should have given an instruction based on Perrine runs afoul of the invited error doctrine. "The doctrine

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[2] In Perrine, the Supreme Court construed the Landowner Liability Act, granting immunity under the Act only to those landowners who opened their property for recreational purposes to all members of the general public. It was in this civil context, with an articulated policy-driven result in mind, that the court interpreted the meaning of the term "public." See Perrine v. Kennecott Mining Corp., 911 P.2d 1290, 1293 (Utah 1996).

[3] Nor, when defendant objected to jury instruction #28, did he offer a fall-back position of an instruction based on Perrine.

of invited error 'prohibits a party from setting up an error at trial and then complaining of it on appeal.'" State v. Perdue, 813 P.2d 1201, 1205 (Utah App. 1991)(quoting State v. Henderson, 792 P.2d 514, 516 (Wash. 1990)); accord State v. Dunn, 850 P.2d 1201, 1220 (Utah 1993). The purpose of the invited error doctrine is to discourage a defendant in a criminal case from inviting prejudicial error and then implanting it in the record "as a form of appellate insurance against an adverse sentence." State v. Parsons, 781 P.2d 1275, 1285 (Utah 1989); accord Dunn, 850 P.2d at 1220 (noting the rule "discourages parties from intentionally misleading the trial court so as to preserve a hidden ground for reversal on appeal").

Because defendant asserted one position at trial -- that no instruction should have been given -- and then, when that strategy failed to produce the desired outcome, he asserted another contrary position on appeal, his claim should be rejected. "This inconsistency smacks of invited error, which is 'procedurally unjustified and viewed with disfavor.'" Parsons v. Barnes, 871 P.2d at 520 (quoting State v. Tillman, 750 P.2d 546, 560-61 (Utah 1987)); cf. State v. Bullock, 791 P.2d 155, 159 (Utah 1989), cert. denied, 497 U.S. 1024 (1990)(defendants not entitled to both benefit of not objecting at trial and benefit of

objecting on appeal).[4]

POINT TWO

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE MEANING OF "PUBLIC PARK" AS THAT TERM IS USED IN THE ENHANCEMENT STATUTE

To the extent that defendant's argument constitutes a challenge to the correctness of the instruction that was given, it must fail because the trial court accurately instructed the jury on the meaning of "public" as that term is used in the drug

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[4] Similarly, defendant argues on appeal that the trial court committed plain error by submitting the enhanced charge, a first degree felony, to the jury (Br. of App. at 15-18). However, at trial, defendant explicitly stated that he wanted the criminal charge against him to be submitted to the jury as a first degree felony. Indeed, submission of the matter as a first degree felony constituted the very heart of his trial strategy. As defendant explained when he objected to the jury instructions defining "public place" and outlining a lesser-included offense:

> [W]e were looking forward to the -- going to the jury just on the first degree felony issue, with the inclusion of the enhancement, because of the fact that I do think that we have a very good issue with regards to whether or not that is a public park. Obviously, if the jury doesn't find it to be a public park, they could not find a first degree felony and the defendant would have been acquitted in that instance.

(R. 263).

Because defendant himself wanted the matter to be submitted to the jury as a first degree felony, he cannot now argue on appeal that the trial court erred by doing precisely as he wished. Dunn, 850 P.2d at 1220.

enhancement statute. Jury instruction #28 provided:

> Public place means any place to which the public or a substantial group of the public has access.
>
> A public place includes, but is not limited to streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

(R. 215).

On appeal, this Court's inquiry centers on whether this instruction accurately stated the law. State v. Gallegos, 849 P.2d 586, 590 (Utah App. 1993). Accordingly, this Court gives no deference to the trial court's determination. State v. Deli, 861 P.2d 431, 433 (Utah 1993). Once this Court determines that the instruction is accurate, however, its inquiry ends. Id. The precise content and specificity of jury instructions is left to the sound discretion of the trial court. State v. Aly, 782 P.2d 549, 550 (Utah App. 1989) (citations omitted).

To determine whether the jury instruction accurately defined the term "public" as used in the drug enhancement statute, a reviewing court applies rules of statutory construction to the statute whose meaning is in question:

> "'The primary rule of statutory interpretation is to give effect to the intent of the legislature in light of the purpose the statute was meant to achieve.'"

> Sullivan v. Scoular Grain Co. of Utah, 853 P.2d 877, 880 (Utah 1993)(quoting Reeves v. Gentile, 813 P.2d 111, 115 (Utah 1991)). Although we generally rely on the plain language rule of statutory construction, id. at 879, we note that an equally important rule of statutory construction is that a statute should be construed as a whole, with all of its provisions construed to be harmonious with each other and with the overall legislative objective of the statute (citations omitted).

Nixon v. Salt Lake City Corp., 898 P.2d 265, 268 (Utah 1995).

The term "public" or the phrase "public park" as used in the Utah Controlled Substances Act is defined neither in the Act itself nor in any Utah case.[5] The definition of "public place" found in Black's Law Dictionary, however, sheds light on the plain meaning of the phrase. In pertinent part, that definition provides that a public place

> is not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually

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[5] That the meaning of the term was not unambiguous from the plain language of the enhancement provision is evidenced by the dispute in this case: the state asked for one definition, the court conjectured about the application of another, and defendant at trial wanted neither. Under the circumstances, the trial court properly clarified the matter and provided guidance to the jury on the meaning of the term. See State v. Hamilton, 827 P.2d 232, 238 (Utah 1992)(trial court has duty to instruct the jury on law applicable to facts).

> accessible to the neighboring public (e.g. a park or public beach). Also, a place in which the public has an interest as affecting the safety, health, morals, and welfare of the community.

Black's Law Dictionary 1107 (5th ed. 1979). The definition of "public place" in jury instruction #28 plainly comports with this definition. Both emphasize that the use is by "many persons" or "a substantial group of the public." Both seem to focus on a functional assessment of "publicness" -- that is, the Black's definition refers to "a place which is in point of fact public" and jury instruction #28 refers to "any place" to which there is access.

Moreover, the intent of the legislature in originally enacting and later expanding the enhancement provision of the Controlled Substances Act supports the correctness of the definition adopted by the trial court.[6] See State v. Scieszka, 897 P.2d 1224, 1227 (Utah App. 1995)("[A] fundamental rule of statutory construction requires that a statute 'be looked at in its entirety and in accordance with the purpose which was sought to be accomplished.'")(citation omitted). The enhancement

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[6] Defendant has ignored both the legislative intent underlying the enhancement statute as well as its related public policy. When these two factors are taken into account, the inapplicability of Perrine becomes apparent.

provision of the Controlled Substances Act was enacted in 1986 and subsequently amended in 1991 "to expand the number of locations where youth congregate to which the enhanced penalties will be applied." Statement of Sen. Lyle Hillyard on H.B. 176, 49th Legislature, Feb. 27, 1991, Tape #47 (on file with the Utah House of Representatives).

The public policy underlying the statutory purpose has been recognized by both of Utah's appellate courts. Penalties for distribution of drugs are enhanced when they occur within 1000 feet of locations frequented by children in order to "'protect the public health, safety, and welfare of children of Utah from the presumed extreme potential danger created when drug transactions occur on or near a school ground [or other places frequented by children].'" State v. Powasnik, 918 P.2d 146, 149 (Utah App. 1996)(quoting State v. Moore, 782 P.2d 497, 503 (Utah 1989)). There can be no real dispute that the overarching intent of the enhancement statute is the creation of drug-free zones "to protect children from the influence of drug-related activity." State v. Stromberg, 783 P.2d 54, 60 (Utah App. 1989), cert. denied, 795 P.2d 1138 (Utah 1990).

Given the unambiguous legislative intent and public policy underlying the enhancement provision, defendant's reliance on

Perrine v. Kennecott Mining Corp., 911 P.2d 1290 (Utah 1996), simply makes no sense. In Perrine, the Utah Supreme Court focused on the legislature's intent in enacting the Landowner Liability Act, which was "'to encourage public and private owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for those purposes.'" Id. at 1292 (quoting Utah Code Ann. § 57-14-1). The legislature's explicit intent was central to the court's defining "public" as including all members of the general public. In the context of the enhancement statute, however, the Perrine definition would serve only to undercut both legislative intent and public policy.

More appropriately, the state at trial, rather than resorting to an unrelated civil statute, proposed a definition of "public place" used in other analogous criminal provisions, specifically the disorderly conduct statute, Utah Code Ann. § 76-9-102(2)(same wording as instruction #28), and the prostitution statute, Utah Code Ann. § 76-10-1301(3)(same as first sentence of instruction #28).

The disorderly conduct provision prohibits conduct which "creates a hazardous or physically offensive condition" in a public place or "conduct intending to cause public inconvenience,

annoyance, or alarm, or recklessly creating a risk thereof." Utah Code Ann. § 76-9-102(1)(a)-(b)(1995). On its face, the statute is aimed at criminalizing certain conduct when it occurs in public places, presumably in order to protect members of the public from that conduct. Analogously, the enhancement provisions of section 58-37-8(5) are aimed at more severely penalizing those who commit drug-related crimes in locations frequented by children, also to protect the public and, in particular, its most vulnerable members, children. The trial court correctly noted these similarities when it evaluated the applicability of the disorderly conduct definition of "public place" to the enhancement statute (R. 264).

The definition embodied in jury instruction #28 comports with both the intent of the legislature in enacting the enhancement statute and similar provisions elsewhere in the criminal code. In contrast, a narrower definition, such as the one now advocated by defendant, would exclude Gazebo Park, or any other park located within a planned residential urban development. In essence, the court would be choosing to insulate from increased liability those drug-dealers who were fortunate enough to live in or have access to parks in newer, upscale housing developments. Clearly, such a result would be untenable

and in direct conflict with both legislative intent and public policy. See State v. Martinez, 896 P.2d 38, 40 (Utah App. 1995)(asserting statutory interpretations which render some part of a provision "nonsensical or absurd" are to be avoided) (quoting Millett v. Clark Clinic Corp., 609 P.2d 934, 936 (Utah 1980)).

POINT THREE

THE EVIDENCE THAT GAZEBO PARK WAS A PUBLIC PARK WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT

Defendant argues that the evidence before the jury that Gazebo Park was a "public park" was insufficient to support his conviction for distribution of a controlled substance within 1000 feet of a public park (Br. of App. at 11-14). The fatal flaw in defendant's argument is his mistaken reliance on the definition of "public" articulated in Perrine. When the evidence is properly viewed in the context of jury instruction #28, the sufficiency of the evidence to support the verdict is quite clear.

An appellate court's role in reviewing the sufficiency of the evidence following a criminal conviction is a limited one. State v. Goddard, 871 P.2d 540, 543 (Utah 1994). "Where there is any evidence, including reasonable inferences that can be drawn

from it, from which findings of all the elements of the crime can be made beyond a reasonable doubt, our inquiry is complete and we will sustain the verdict." State v. Gardner, 789 P.2d 273, 285 (Utah 1989), cert. denied, 494 U.S. 1090 (1990). A conviction will be reversed on insufficiency grounds only when the evidence is so lacking that "reasonable minds must have entertained a reasonable doubt" that defendant committed the crime. State v. Petree, 659 P.2d 443, 444 (Utah 1983), superseded on other grounds, State v. Walker, 743 P.2d 191 (Utah 1987).

In the light most favorable to the jury's verdict, the jury had before it the following evidence. Lake View Heights is a North Ogden subdivision of 366 homes in which "a large number of children" live (R. 283, 298-99). Conservatively, at least 1000 people reside in Lake View Heights (R. 284). Gazebo Park, the largest of three parks within the confines of Lake View Heights, is outfitted with a small area of children's playground equipment, including swings, tires, and sand (R. 275, 287). Plainly, the presence of playground equipment in the park evidences an intent to attract children there to play. In addition, the park contains a gazebo with picnic tables, some grassy areas with trees, and tennis courts (R. 287). While signs at the park read: "Private Property. Lake View Heights Homeowner

Association, Members Only," the only area of controlled access in the park is the tennis courts (R. 276, 296).[7] Everyone who lives in Lake View Heights and, consequently, belongs to the Lake View Heights homeowners' association, has access to all park facilities (R. 297). Like any other park in Ogden, Gazebo Park is patrolled by the North Ogden city police department (R. 280).

Without dispute, more than 1000 people, including many children, had access to Gazebo Park. A jury could thus reasonably infer that, despite the signage at this neighborhood recreation area, a "substantial group of the public" -- all of the residents of Lake View Heights -- were welcome to use it.[8] Further, because "the common areas of . . . apartment houses [and] office buildings" are public places, the jury could also reasonably infer that the common recreation area of a subdivision is also a public place. See Jury instruction #28. Thus,

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[7] Moreover, the evidence was sufficient to establish that the park was open to the public, despite the posted sign, since "the park was accessible to and, in fact, used by many of the children in the neighborhood." See United States v. Horsley, 56 F.3d 50, 52 (11th Cir. 1995) (addressing whether a playground that had posted signs indicating it was private was nonetheless "open to the public" under 21 U.S.C. § 860).

[8] Certainly these individuals did not give up their status as members of the public simply by virtue of buying homes in this particular subdivision.

applying the facts before the jury to the law as articulated in jury instruction #28, the jury had sufficient evidence from which to conclude that Gazebo Park had sufficient indicia of being a "public park" to come within the ambit of the enhancement provisions of *Utah Code Ann.* § 58-37-8(5).

CONCLUSION

For the reasons stated, this Court should affirm defendant's first degree felony conviction for distribution of a controlled substance (cocaine) within 1000 feet of a public park.

RESPECTFULLY submitted this 16th day of June, 1997.

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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were mailed first-class, postage prepaid, to Michael J. Boyle, 550 East 24th Street, Suite 204, Ogden, Utah 84401, this 16th day of June, 1997.

Joanne C. Slotnik

ADDENDUM A

(Objections to Jury Instructions)

THE COURT: We agreed that we would make the objections on the record at this time, so go ahead, Mr. Boyle.

MR. BOYLE: Your Honor, at this time I would object to the inclusion of the definitions of "public" in the jury instructions based on the fact that the statute itself, which includes the Controlled Substance Act, does not itself have a definition of public. And that, basically, in the instructions -- they were added to the jury instructions. Those definitions of public came from other statutes, which it would appear from the language of those statutes that those definitions were only for that statute itself, or that portion of the statute -- for instance, the disorderly conduct statute, the pornography statute.

I'd argue that the jury, itself, could have easily made a decision of simply what public means just because it's a very common term and didn't need any statutory instruction on that. And that's the basis of my objection, Your Honor.

THE COURT: Okay.

MR. BOYLE: Moreover, Your Honor, the -- I object at this time to the inclusion of the

lesser included offense. The State has filed an Information in this case and did not file it in the alternative, and the addition of the lesser included offense substantially prejudiced the defendant's case by the fact that we were looking forward to the -- going to the jury just on the first degree felony issue, with the inclusion of the enhancement, because of the fact that I do think that we have a very good issue with regards to whether or not that is a public park. Obviously, if the jury doesn't find it to be a public park, they could not find a first degree felony and the defendant would have been acquitted in that instance. And that's why we're objecting at this time.

THE COURT: Okay. Any further objections?

MR. BOYLE: Just one. For the record, Your Honor, if the Court could please state its reason for consistently overruling my objections with regards to hearsay when the officers were testifying to not only what the defendant might have said, but what the confidential informant had said, or possibly a female that was also talked about in the transcript.

THE COURT: It's very easy. They

are not being admitted for the truth of the matter asserted. In other words, their testimony of what the individual said, they were not trying to prove a fact or the truth of what the people were saying. They were just stating what they were hearing coming over the microphone. And that's clearly not hearsay.

MR. BOYLE: Okay. Thank you.

THE COURT: The pleasure is almost all mine. Let's see, I -- it occurred to me, Mr. Boyle, that this -- the issue of the public park has kind of put you between a rock and a hard place. The Court has instructed the jury on what a public place is and has instructed them based on a provision out of the disorderly conduct section which is 76-9-102, subsection (2), and that section does specifically state that this definition applies to this section, which would imply that it's not a universal kind of definition.

I instructed the jury in that regard, frankly, because I felt like the intent of the legislature in protecting the public would have been identical in the two sections, and I felt like that would be a good reason to do that. And I recognize because of -- because of the position that your client finds himself in, wanting to have the issue submitted just

on the issue of the public park issue, it kind of puts you in a bad position to make a motion for a directed verdict on the issue of the public -- whether it's a public park or not a public park under the provisions of the drug section -- Title 58, isn't it?

What I'm beating around the bush about is that you have not made a motion to -- for a directed verdict, but in view of the circumstances of the case I'm not -- I am not going to -- I am going to allow you to consider a motion for a judgment N.O.V. based on the concept of whether this is a public or private park.

In other words, I'm not completely certain that I've instructed the jury correctly on that issue, so I suppose I'm reserving the prerogative of reconsidering or revisiting that issue, depending on what the jury verdict is. Thank you.

MR. BOYLE: Thank you, Your Honor. I would assume that I would make that when you get the verdict back?

THE COURT: Well, in order to make that motion, you see, you would had to have made a motion for a directed verdict, and, of course, you haven't done that -- and I think for certain

strategic reasons. I recognize the fact that that would have been a difficult philosophical position.

But I'm not convinced -- I've been looking at some of the other authorities. I just pulled up Utah Law On Disc and was looking at some cases, and the Supreme Court, in a fairly recent case -- and this was sitting way back down in the deep, dark recesses of my mind. It was a civil case where somebody was injured in a public park. And the State had -- one of the defenses that was raised was a provision where landowners, if they voluntarily allow people to use their property for recreational purposes, are not liable. It's almost across the board. And the Supreme Court, in that case, spent a lot of time talking about what is -- what is public land and what is private and --

MR. BOYLE: That was the Kennecott case, wasn't it?

THE COURT: Pardon me?

MR. BOYLE: Was it the Kennecott case?

THE COURT: No. It's -- I don't remember. It came down maybe a month or two ago. It's fairly new law.

But at any rate, they spent a lot of time

talking about the distinctions. They were using the distinction the other way in that case: Is this -- is this private property? They seemed to feel that that would apply more to private property than it would to public, so they were talking about the distinction between public and private. And their definition of what was public property was a good deal broader than the definition we've used here. And the definition that they used is that there's a right of general access to public property, as opposed to -- which would be almost -- which would almost implicitly make this a private park as opposed to a public park.

And I recognize that that's probably not a good analogy because, in fact, it's, you know, an entirely different kind of lawsuit. It's civil, and we do have these criminal definitions that are a good deal more narrow, but it's something I think I would like to take a look at, depending on how the jury comes back.

MR. SAUNDERS: That's fine, Your Honor. For the record, this is not new. Mr. Boyle and I briefed the issue before the Court on preliminary hearing and looked for applicable law. This was the closest thing we could find.

So effort has been made to try to find out if there is a definition that specifically applies to this type of case. There is not and those definitions that we've supplied to the Court are *those we felt are the most appropriate.*

MR. BOYLE: Your Honor, the State's being modest. In fact, they did an exhaustive search to try to find out what public actually means.

You looked all the way to New York, didn't you? Those two cases in New York?

MR. SAUNDERS: The ones that said if a neighboring community has access?

MR. BOYLE: Was that the New York cases?

THE COURT: Well, it's certainly an interesting question. You know, it's a close question when you consider do we -- you know, the common law was that you -- that you interpret criminal statutes strictly, although our criminal code says, you know, that it's to be interpreted not as the common law strictly, but to best effectuate its purpose. And that's what I was kind of kicking around in my mind. Do we interpret it strictly, use a strict interpretation of what is public, or can we use a comparable statute?

Well, it's an interesting question. Maybe we won't have to worry about it. At any rate, any further matter of business?

MR. BOYLE: That was it, Your Honor.

THE COURT: All right. Court's in recess until the jury returns.

(WHEREUPON, at this time objections to the jury instructions conclude.)